BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 14 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY,
MONON RAILROAD,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, - - - - - - - - Appellants,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

JAMES W. HOELAND,
908 W. Broadway,
Louisville, Kentucky 40201,
(Counsel of record on whom service should be made)

W. L. GRUBBS,
JOSEPH L. LENIHAN,
908 W. Broadway,
Louisville, Kentucky 40201,
Attorneys for Appellee, Louisville and Nashville Railroad Company.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

BLANK

PAGE

SUBJECT INDEX.

PAGE

I. The Motion 1

II. Brief in Support of the Motion 2

Statement 2

Argument 5

I. The Commission Made Adequate Findings With Regard to the Competitive Effects on the Monon 5

II. The Conditions for Compulsory Negotiations Are Not To Be Judged by Antitrust Standards 11

III. The Court Should Not Prejudice What Action the Commission Will, or Should, Take When L&N Files Its Subsequent Section 5(2) Application 13

Conclusion 15

Appendix A 17

Appendix B 19

TABLE OF CASES AND STATUTES CITED.

Decisions of Courts.

PAGE

Broth. of Maint. of Way Employees v. *United States*, 221 F. Supp. 19 (1963), affd. per curiam 375 U. S. 216 ..... 7, 8

McLean Trucking Co. v. *U. S.*, 321 U. S. 67, 87-88 ..... 10, 11, 15

Minneapolis & St. Louis R. Co. v. *U. S.*, 361 U. S. 173 12

Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282, 286-287 5

N. Y. Central Securities Co. v. *U. S.*, 287 U. S. 12, 25 3

Seaboard Air Line R. Co. v. *U. S.*, 382 U. S. 154, 156-157 12

Decision of Interstate Commerce Commission.

Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 7

Statutes Cited.

Interstate Commerce Act:

Section 5(2) [49 U.S.C.A. 5(2)] 3, 10, 13, 14

Section 5(2)(b) 14

Section 5(2)(d) 3

Section 5(11) [49 U.S.C.A. 5(11)] 11, 12, 13, 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY,
MONON RAILROAD,
ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, - - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (L&N), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

STATEMENT.

The jurisdictional statements of the Illinois Central Railroad Company and the St. Louis Southwestern Railway Company present no question attacking the district court's opinion as it relates directly to the conditions for compulsory negotiations between the L&N and Chicago & Eastern Illinois Railroad Company (C&EI) in contemplation of the sale of the C&EI's line between Evansville, Indiana, and Chicago, Illinois, to the L&N. Only the Monon Railroad (Monon) raises any question regarding such conditions. Therefore, this brief will be directed to the questions and arguments in the jurisdictional statement of the Monon. L&N respectfully adopts the arguments, as fully as had they been presented herein, of the other appellees directed to the jurisdictional statements of the Illinois Central Railroad Company and the St. Louis Southwestern Railway Company.

In its report and order, the Commission authorized stock control of the C&EI by the Missouri Pacific Railroad Company (MoPac), subject to certain conditions, including those calling for compulsory negotiations between the L&N and C&EI for the possible sale of the Evansville line to the L&N. Such compulsory negotiation conditions (reproduced in Appendix A) were imposed, as the district court properly held (App.

25a), pursuant to the provisions of Section 5(2)(d) of the Interstate Commerce Act [49 U.S.C.A. 5(2)(d)].[1] The L&N invoked the jurisdiction of the Commission when it timely filed its petitions for inclusion in each of the two applications for control of the C&EI.

In providing for compulsory negotiations regarding sale of the Evansville line, the Commission was guided by this Court's criteria of public interest set forth in *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12, 25, wherein this Court held:

> "the term 'public interest' . . . has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. . . ."

In line with these standards and upon the convincing record before it, the Commission was compelled to find ultimately that "[w]e would be derelict in our responsibility to serve the public interest if, in the face of this record, we failed to provide [L&N] an opportunity to acquire the Evansville line" (App. 57a).

The record established, and the Commission found, that the Evansville line and the L&N lines constituted one of the major rail arteries between the north and

---

[1]Section 5(2)(d) provides as follows:

"The Commission shall have authority in the case of a proposed transaction under this paragraph [(2)] involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

the south, providing the shortest route between Chicago and many points in the southeast and handling, for many years, great volumes of traffic (App. 58a). By acquiring the Evansville line, the L&N would establish a major, first class, single-line rail route between Chicago and the southeast to be accomplished by installing heavy-duty rail, rebuilding bridges and otherwise rehabilitating the physical plant, improvements which C&EI could not undertake because of its financial limitations (App. 58a). In addition the L&N would consolidate facilities and functions, eliminating congestion and delay (App. 58a), provide its large, modern and varied supply of rolling stock to shippers on the Evansville line and bring "to bear upon the entire single-line operation an efficient program for operating repair shops and terminals, for handling cars and trains, for maintenance operations, for administration functions and for customer service" (App. 58a-59a).

An important consideration in the Commission's deliberations were the facts that the Evansville line in 1960 was operated at a net loss of $2.7 million (App. 67a) and that the Evansville line did not logically fit into the MoPac system (App. 65a), whereas that line is ideally suited to be a part of the L&N system (see Appendix B attached). Under Missouri Pacific control, the Evansville line would be a dangling appendage, burdened with the same inherent disadvantages as those which attend the present operation, the latter of which the C&EI's President recited on the record (Exhibit H-127, Statement BE).

It is little wonder, therefore, that the L&N's proposal was so enthusiastically supported by the public, including the Governors of the States of Indiana, Kentucky, Tennessee and Alabama, other public officials and many shippers having a direct interest in rail service via the Evansville line.

None of these findings by the Commission, all of which were supported by solid and virtually unchallenged evidence, have been, nor could they properly be, questioned during the course of judicial review.

Only the limited issue of whether the Commission gave adequate consideration to the competitive effects on the Monon is attacked. As will be shown herein, the Commission did give adequate consideration and did make adequate findings with regard to the Monon. Accordingly, a "rational basis" exists for the imposition of the compulsory-negotiation conditions, and the final judgment of the court below should be affirmed. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-287.

ARGUMENT.

I. The Commission Made Adequate Findings With Regard to the Competitive Effects on the Monon.

The Monon's position during the course of judicial review has been that the Commission ignored the Monon's testimony of traffic diversion and that if the Commission had adequately considered such testimony, it, perforce, would not have imposed the compulsory-negotiation conditions.

Responding to that contention it should initially be noted that in the portion of the examiner's recommended report which the Commission adopted in its own report, under the heading "Monon Railroad," the Commission considers and discusses the very testimony which Monon claims the Commission ignored (App. 165a-166a). At those pages, Monon's diversion study is considered in detail, showing how the study was made, how Monon analyzed its statistics, and how many carloads of traffic and how much gross revenue were allegedly to be diverted by L&N. Elsewhere in the Commission's report (App. 174a and 175a) the Monon's alleged diversions are further discussed, and the criticism by the L&N of Monon's alleged diversion are summarized (App. 175a and 176a). From these portions of the Commission's report, it is clear that Monon's testimony was not ignored. And further proof that consideration was given to that, and other, diversion estimates is found in the report when the Commission held (App. 63a):

> "While the testimony of these supporting witnesses demonstrates a public concern for the preservation, improvement and expansion of rail service on routes in which [L&N] participates, a concern which, no doubt, could be allayed and satisfied by the institution of [L&N's] proposal; another concern of some gravity is in evidence and demands like attention, namely that of opposing railroads apprehensive of their own traffic in the face of the prospective intensification of competition."

Thus, the issue is whether the Commission made adequate basic findings when it held (App. 65a):

> ". . . [W]e do not believe [L&N] could, by its operations of the Chicago-Evansville line, so prevail over the railroads opposing its plan as to impair or significantly affect their ability to compete or maintain the standard of service to which shippers have become accustomed."

Traffic diversion estimates, based on past experience, do not necessarily form a proper basis for future projections. They assume that all traffic patterns and volumes are static. They are based on a past period of time under circumstances then existing and are presumed to apply in future years when different conditions will doubtless exist. With respect to the Monon's estimate, it does not take into account such factor as that the study period was 1961, when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years. The unreliability of diversion estimates as a guide to the future was passed upon by the Commission in *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, wherein it held (p. 282):

> "We have found from our past experience in similar proceedings that the diversion of traffic in the volume predicted rarely, if ever, occurs."

An issue similar to the one raised by the Monon was decided in *Broth. of Maint. of Way Employees* v. *United States*, 221 F. Supp. 19 (1963), affd. *per curiam*

375 U. S. 216. This was an action brought to set aside the Commission's order approving the acquisition of stock control of the B&O by the C&O. On the point which Monon here raises, the Court held (p. 25):

> "It is the contention of the plaintiffs here, however, that the Commission's finding that 'no undue amount of traffic will be diverted from Central' is inadequate. They contend that it should have made a specific determination as to how much traffic would be diverted from Central. We cannot agree. The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction."

Rather than base its ultimate findings on the conflicting diversion estimates of Monon and L&N—which at best are sheer guesswork of future circumstances—the Commission, in support of its imposition of the compulsory negotiation provisions, understandably chose to base the finding of no adverse effect upon other railroads on established facts of record, which "would come into play to prevent a serious or abrupt dislocation of the present competitive balance" (App. 64a).

Those facts which the Commission termed "countervailing factors" (App. 64a) and on which the Commission made specific findings, are:

> (1) "On joint-line routes to and from Chicago via the Cincinnati and *Louisville*[1] gateways—where modern, electronic classification yards are

[1]Only the Monon, of those opposing the L&N before the Commission, interchanges traffic with the L&N at Louisville which is competitive with the L&N-Evansville line route.

in operation—there are service advantages which would preclude the diversion of traffic to the Evansville line (App., p. 64a)." [Emhasis added].

(2) "[L&N] would be subject to routing instructions of Shippers (App., p. 64a)."[1]

(3) [L&N would be subject to] "retaliatory action by other railroads upon which it depends for important interchange traffic (App., p. 64a)."

(4) [L&N would be subject] "to the traffic conditions we would impose to keep open the existing gateways and channels of commerce (App., p. 64a)."

(5) ". . . during the past decade the 5-State area of the southeast served by [L&N] and its connections—Alabama, Florida, Georgia, Kentucky and Tennessee—has experienced a higher rate of population and industrial growth than other sections of our country." And in view of that finding the Commission went on to hold "[t]o the extent [L&N] might attract a portion of the new traffic being generated by the area's growth or recapture traffic previously diverted to other modes of carriage, the success of its operation would have no deleterious effect upon other railroads, but, instead, would contribute to their well-being, at least as to [L&N] rail connections . . . . (App., pp. 63a-64a)."

All of these five findings have substantial factual support in the record. Thus, facts and not estimates were the basis of the Commission's finding that no carrier would be significantly affected in its ability to compete.

---

[1]The evidence before the Commission establishes that shippers route 95 percent of all traffic (Tr. 1535).

Accordingly, if the conditions in the Commissioner's report and order had authorized the acquisition of the Evansville line by the L&N (once MoPac acquires control of the C&EI), the evidence of record and the findings of Commission would have fully provided the requisite "rational basis" for such conditions insofar as the competitive consequences of acquisition are concerned, and the Court will not substitute its judgment on this issue for that of the Commission. *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 87-88. The Commission's order, however, went no farther than to require compulsory negotiations for such acquisition; L&N still must file its own Section 5(2) application for authority to acquire the Evansville line, when an agreement of sale is reached or, if no agreement is reached, within one year following the effective date of the Commission's order here being reviewed (App., p. 68a).[1]

[1]The Monon's contention that L&N can commence temporary operations on the Evansville line without further Commission action (J.S., p. 9) is without merit. The Commission's report and order does not contemplate nor provide for any operation, temporary or permanent, prior to further authorization by the Commission upon L&N's later Section 5(2) application, and L&N states to this Court, as it did to the district court through the affidavit of its President, that it has no intention to seek any temporary rights.

II. The Conditions for Compulsory Negotiations Are Not To Be Judged by Antitrust Standards.

There are three decisions of this Court interpreting Section 5(11) of the Interstate Commerce Act,[1] which clearly and consistently hold that the Commission is not to judge carrier consolidations by the standards of the antitrust laws. The first is the *McLean* case, *supra,* wherein this Court held (321 U. S. 67, 84-85):

> ". . . [T]here can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws . . . [a]nd in authorizing those consolidations [Congress] did not import the general policies of the anti-trust laws as a measure of their permissibility."

Further, this Court held (p. 86):

> ". . . [T]he Commission is not bound, as appellants urge, to accede to the policies of the anti-trust laws so completely that only where 'inadequate' transportation facilities are sought to be made 'adequate' by consolidation can their dictates be overborne by 'the public interest.' That view, in effect, would require the Commission to

---

[1]Section 5(11) [49 U.S.C.A. 5(11)] reads in pertinent part as follows:

> "The authority conferred by this section shall be exclusive and plenary, . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . ."

> permit only those consolidations which would not offend the anti-trust laws. As has been said, this would render meaningless the exemption [of Section 5(11)] relieving the participants in a properly approved merger of the requirements of those laws, and would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices."

The second case is *Minneapolis & St. Louis R. Co.* v. *U. S.*, 361 U. S. 173, wherein this Court in reaffirming its decision in *McLean* held (p. 187):

> "Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest."

And the most recent pronouncement of this Court reaffirming its decisions in *McLean* and *Minneapolis* is *Seaboard Air Line R. Co.* v. *U. S.*, 382 U. S. 154, 156-157, wherein this Court said:

> ". . . It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.' 54 Stat. 906, 49 U.S.C. §5(2)(b) (1964 ed.)."

The competitive effect of L&N acquisition of the Evansville line is, of course, a factor for the Commis-

sion to consider in evaluating whether the proposal is consistent with the public interest. As we have established in the preceding section of this brief, the Commission did give such consideration in finding ultimately that the public interest criteria supporting L&N acquisition required imposition of the compulsory-negotiation conditions.

III. The Court Should Not Prejudge What Action the Commission Will, or Should, Take When L&N Files Its Subsequent Section 5(2) Application.

What is here being judicially reviewed is the report and order of the Commission which authorized control of the C&EI by the Missouri Pacific, subject to the conditions *subsequent* calling for compulsory negotiations between the C&EI and the L&N.[1] In other words, the four corners of the Commission's report and order *here being reviewed* are to be examined to determine if there is warrant for the imposition of such conditions, and, as we have shown, the facts of record and the Commission's findings fully support its action. Contrary to the position of the Monon, the Court is not at this time, or in this proceeding, to be called upon to anticipate what further action the Commission will take when L&N files its Section 5(2) application for acquisition of the Evansville line. As the Commission's power is "exclusive and plenary" [Section

[1]Monon improperly characterizes the conditions as being precedent (J.S., p. 9). In fact, the conditions have no vitality unless and until MoPac acquires control of the C&EI (please see Appendix A).

5(11)], these are matters for the Commission to decide in the exercise of its broad discretionary powers when the L&N later files its application. Then, it may be that the Monon itself will be involved in a merger proceeding resulting in a total breakdown in its opposition to the L&N's application. Conceivable, the L&N may consider the price for the Evansville line to be set by the Commission[1] to be excessive, and so not elect to acquire the line. Or, the conditions which the Commission attaches to its later order authorizing L&N acquisition of the Evansville line may be totally acceptable to the Monon. Any of these circumstances, and likely others, could alter or eliminate the course of Monon's opposition at the time when the Commission issues its later order.

Section 5(2)(b) authorizes the Commission to grant a further hearing if the public interest so requires. This discretion is reposed solely in the Commission, and if the Commission, when it issues its order authorizing L&N acquisition of the Evansville line, abuses that discretion, or if Monon otherwise feels aggreived by such order, it then can attack that order, raising whatever issues it regards as appropriate.

But, we respectfully submit, the Court should not in this case presume to decide that the Commission will deprive the Monon, or anyone else, of fair and adequate consideration when L&N later files its Section 5(2) application. What is here being reviewed is the

---

[1]In the event C&EI and L&N fail to reach an accord the Commission is to set the price for the line (App., p. 68a).

rational basis for the Commission's action in proceedings already held and not those to be held at a later time. And the rational basis for the compulsory-negotiation conditions clearly exists.

CONCLUSION.

The facts of record before the Commission fully support its preliminary and ultimate findings that the public interest requires imposition of those conditions of compulsory negotiations looking toward L&N's acquisition of the Evansville line. The Monon's argument that the Commission virtually ignored the Monon's contention of competitive disadvantage is, in essence, an allegation that the Commission should have accepted Monon's traffic diversion estimates at face value, and so it is asking the Court to substitute its judgment for the Commission's on this issue. This the Court will not do. *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 87-88.

Although the record and the Commission's findings on competitive consequences would have supported a grant of authority to acquire the Evansville line, such grant must await further application from the L&N and later order of the Commission. Then, it may be that circumstances will have altered so as to eliminate Monon opposition. In any event, the extent of further proceedings with regard to L&N acquisition is a matter of Commission discretion which, if later abused, will provide Monon with adequate opportunity for judicial review.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the court below should be affirmed.

Respectfully submitted,

JAMES W. HOELAND,
908 W. Broadway,
Louisville, Kentucky 40201,
(Counsel of record on whom service should be made)

W. L. GRUBBS,
JOSEPH L. LENIHAN,
908 W. Broadway,
Louisville, Kentucky 40201,
Attorneys for Appellee, Louisville and Nashville Railroad Company.

BLANK

PAGE

APPENDIX A.

CONDITIONS IN THE COMMISSION'S REPORT (APPELLANT APPENDIX, pp. 67a-68a) RELATIVE TO L&N ACQUISITION OF THE EVANSVILLE LINE.

1. "Missouri Pacific, if it assumes control of Eastern,* shall immediately thereupon . . . take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to Dixie Line,* of so much of Eastern's line of railroad, including branches, appurtenances and facilities as is set out in Appendix C hereto, so that Dixie Line would be enabled to provide service between Evansville and Chicago . . .";
2. "Such 'negotiations to begin as soon as feasible and to be completed not later than one year after the effective date of our order herein'; and
3. "Dixie Line is to submit for consideration of this Commission, by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations; but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which Dixie Line may accomplish the acquisition of the Eastern properties set out in Appendix C."

*Throughout the Commission's report and order the C&EI and the L&N are referred to, respectively, as "Eastern" and "Dixie Line."

BLANK

PAGE

APPENDIX B.

SVILLE & NASHVILLE — C & E I